

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
JEAN LEECY	:	DETERMINATION
	:	DTA NO. 815174
for Redetermination of a Deficiency or for Refund of	:	
Personal Income Tax under Article 22 of the Tax Law	:	
for the Years 1981 and 1982.	:	

Petitioner, Jean Leecy, 4937 Spring Lake Road, Wolcott, New York 14590, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the years 1981 and 1982.

A hearing was held before Timothy J. Alston, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on June 17, 1997 at 1:15 P.M., which date began the six-month period for the issuance of this determination. Petitioner appeared *pro se*. The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Herbert M. Friedman, Jr., Esq., of counsel).

ISSUE

Whether the Division of Taxation properly denied petitioner's claim for refund as untimely.

FINDINGS OF FACT

1. On May 21, 1984, the Division of Taxation ("Division") issued to petitioner, Jean Leecy, a Notice of Deficiency which asserted a penalty pursuant to Tax Law § 685(g) in the amount of \$6,696.61. This penalty was equal to the amount of unpaid withholding taxes the

Division determined to be due from Prestige Remodeling and Home Repair Service, Inc. for the years 1981 and 1982.

2. On May 5, 1985, the Division filed a warrant against Chris G. Burrell, individually and as officer of Prestige Remodeling and Home Repair Service, Inc., in the office of the Monroe County Clerk. This warrant indicated an assessment against Burrell of \$6,696.58 in penalty for the years 1981 and 1982. Like the assessment against petitioner, the assessment against Burrell was made pursuant to Tax Law § 685(g) and was equal to the amount of unpaid withholding taxes determined to be due from Prestige Remodeling and Home Repair Service, Inc. for the years 1981 and 1982.

3. The Burrell warrant indicates that it was “wholly satisfied” as of April 2, 1986.

4. Petitioner filed a petition with the Division of Tax Appeals in protest of the May 21, 1984 Notice of Deficiency. Following a hearing on December 1, 1987 before an administrative law judge, a determination was issued on February 19, 1988 which held that petitioner was a person required to collect, truthfully account for and pay over withholding taxes on behalf of Prestige Remodeling and Home Repair Service, Inc. and that petitioner had willfully failed to collect and pay over such taxes. The determination therefore denied the petition and sustained the May 21, 1984 Notice of Deficiency. Petitioner did not file an exception to the February 19, 1988 determination.

5. On September 29, 1989, the Division filed a warrant against petitioner in the office of the Wayne County Clerk with respect to the assessment arising from the May 21, 1984 Notice of Deficiency. The warrant indicated unpaid penalty in the amount of \$6,696.58, plus interest of \$733.87, for a total amount due of \$7,430.45.

6. Petitioner's 1989 New York State income tax return, filed jointly with her husband, claimed a refund of \$480.00. The Division applied this refund to petitioner's withholding tax penalty assessment.

7. Petitioner caused checks dated December 10, 1991 and February 26, 1992 in the respective amounts of \$7,430.45 and \$1,331.15 to be remitted to the Division in full payment of the subject assessment, plus accrued interest.

8. Petitioner was in contact with the Division on several occasions from the time of the filing of the warrant against her in 1989 through the time the warrant was finally satisfied in 1992. Petitioner was never told that the Burrell warrant was satisfied. Petitioner became aware that the Burrell warrant was satisfied in 1994.

9. By an Application for Credit or Refund dated November 16, 1994, petitioner claimed a refund of \$7,430.45 in respect of the subject assessment. In her application petitioner noted the satisfaction of the warrant filed against Burrell on April 2, 1986, and contended that the Division had subsequently collected the same tax from her. Petitioner contended that since the tax was paid twice, she is entitled to a refund.

10. By letter dated April 12, 1995 the Division denied petitioner's refund claim.

11. It is noted that, in 1982, petitioner and Burrell entered into an agreement which provided, among other things, that Burrell and Prestige Remodeling and Home Repair Service, Inc. "release" petitioner from "any and all claims or obligations for all Federal and State taxes owed by Prestige Remodeling and Home Repair Service, Inc."

12. In her second petition, dated July 8, 1996, petitioner contended that the Division's denial of her refund claim was improper and also claimed a refund of her 1989 State income tax refund of \$480.00 which was applied by the Division to her withholding tax penalty assessment.

CONCLUSIONS OF LAW

A. Section 689(c)(1) of the Tax Law provides that, in order for a taxpayer to file a petition with the Division of Tax Appeals for the amount asserted in an application for refund, the taxpayer must have filed a timely claim for refund with the Division of Taxation. Section 687(a) of the Tax Law provides that a claim for credit or refund of an overpayment of income tax must be filed by the taxpayer within three years from the time the return was filed or two years from the time the tax was paid, whichever is later. Petitioner's Application for Credit or Refund, dated November 16, 1994, was filed more than two years from the time petitioner finally satisfied the warrant filed against her on February 26, 1992, and was thus filed beyond the time limitations set forth in Tax Law § 687(a). The petition in this case is therefore barred pursuant to Tax Law §§ 687(a) and 689(c)(1).

B. Even if petitioner's refund claim had been timely filed, the petition in this matter would nonetheless be barred pursuant to Tax Law § 689(c)(2), which allows the filing of a petition for the amounts asserted in a refund claim if:

“[T]he taxpayer has not previously filed with the [Division of Taxation] a timely petition under [Tax Law § 689(b)] for the same taxable year unless the petition under this subsection relates to a separate claim for credit or refund properly filed under subsection (f) of section six hundred eighty-seven.” (Tax Law § 689[c][2].)

In this case, petitioner previously filed a timely petition under Tax Law § 689(b) for the same taxable years as her refund claim. That petition resulted in the hearing before an administrative law judge on December 1, 1987 and the determination issued on February 19, 1988 (*see*, Finding of Fact “4”). In addition, although her theory differs in each case, in both the present case and in the previous matter petitioner contests her liability for the same assessment of penalty under Tax Law § 685(g). Specifically, in the present case, petitioner contends that she

was not liable because the assessment was satisfied by Burrell. In the previous case petitioner contended that she was not liable because she was not a responsible officer of Prestige Remodeling and Home Repair Service, Inc.¹ Accordingly, the petition in this matter was barred by Tax Law § 689(c)(2).

C. Since petitioner's right to petition for a hearing is specifically denied by section 689(c) of the Tax Law, the Division of Tax Appeals is without jurisdiction to consider the merits² of petitioner's claim (*see*, Tax Law § 2006[4]).

D. The petition of Jean Leecy is dismissed.

DATED: Troy, New York
December 4, 1997

/s/ Timothy J. Alston
ADMINISTRATIVE LAW JUDGE

¹ Considering that the Burrell warrant was satisfied on April 2, 1986 and the prior administrative law judge hearing was held on December 1, 1987, petitioner conceivably could have raised the "double collection" issue at the prior hearing.

² Regarding the merits of petitioner's claim, it should be noted that the Division's collection of penalty from petitioner appears to have been improper. Where there are multiple section 685(g) responsible officer assessments, the Division of Taxation may not collect, in the aggregate, more than the total amount of tax assessed against the corporation (*Matter of Phillips*, Tax Appeals Tribunal, May 11, 1995). Here, of course, the Division collected from both Burrell and petitioner. In fairness to the Division, however, the Tribunal's decision in *Phillips*, which was the first case to address this issue directly, was issued approximately three years after petitioner had paid her assessment. In any event, any discussion of the merits of this case is purely academic, for, as noted above, the Division of Tax Appeals has no jurisdiction.